

March 30, 2005

**DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY**

Appeal

Name of Petitioner: Gideon Group, Inc.

Date of Filing: December 13, 2004

Case Number: TFA-0081

On December 13, 2004, Gideon Group, Inc. (Gideon) filed an Appeal from a determination issued to it by the Department of Energy's National Energy Technology Laboratory (NETL). In that determination, NETL released some documents with redactions. The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require NETL to release the withheld information.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. ¶ 1004.¹

I. Background

On October 19, 2004, Gideon submitted a FOIA request to DOE for copies of proposals submitted by two companies (TIAX and ECR) in response to DOE Solicitation Number DE-PS36-03GO93014. Letter from Gideon to DOE (October 19, 2004). The DOE solicitation sought applications for research and development projects "that will advance the integration of energy-efficient technologies in residential Micro-Cooling, Heating and Power (CHP) applications." Letter from NETL to OHA (February 11, 2005) (NETL Comments). NETL forwarded copies of each company's application to its respective submitter for comments. The submitters reviewed their applications and identified all information that they considered exempt from disclosure under Exemption 4.¹ NETL reviewers concurred with the redactions made by TIAX and ECR personnel. On November 22, 2004, NETL sent the redacted applications to Gideon, describing in general terms the information that was withheld under Exemption 4. Letter from NETL to Gideon (November 22, 2004) (Determination Letter). On December 14, 2004, Gideon filed this Appeal. Letter from Gideon to Director, OHA

¹ Gideon requested "proposals" submitted by TIAX and ECR. However, because the solicitation was conducted under DOE's financial assistance regulations, the word "applications" is more accurate. Letter from NETL to OHA (February 11, 2005) footnote 1.

(December 14, 2004) (Appeal). In the Appeal, Gideon requested that OHA direct NETL to release any responsive material in its possession that was not marked confidential in accordance with the instructions in the solicitation. *Id.*

II. Analysis

A. Exemption 4

Exemption 4 of the FOIA exempts from mandatory disclosure “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). Thus, in order to qualify under Exemption 4, a document must contain either (1) trade secrets or (2) information that is “commercial or financial, obtained from a person and privileged or confidential.” *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). If the information was involuntarily submitted, before withholding it under Exemption 4 the agency must show that release of the information is likely to either (i) impair the government’s ability to obtain necessary information in the future or (ii) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770. Information a submitter provides to an agency voluntarily is “confidential” if “it is of a kind that the provider would not customarily make available to the public.” *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993) (*Critical Mass*).

Information submitted in a procurement process is considered submitted involuntarily, and thus the *National Parks* test applies in this case. *Glen M. Jameson*, 26 DOE ¶ 80,236 (1997). In response to this Appeal, NETL provided us with unredacted and redacted copies of the responsive material, along with detailed comments explaining their withholding. *See* NETL Comments. We have reviewed the material withheld under this exemption and find that the deleted information was properly withheld under the *National Parks* test. First, the information withheld was clearly commercial information. The withheld material referred to new products that had been designed for commercial application, along with marketing and personnel information. Second, the information was obtained from TIAX and ECR, both corporations. We have previously found that corporations are deemed “persons” for purposes of Exemption 4. *See Myers Bigel Sibley & Sajovec*, 27 DOE ¶ 80,225 (1999). Finally, we find that the information was properly considered confidential for purposes of Exemption 4 because its disclosure is likely to cause substantial harm to the competitive positions of TIAX or ECR if released. For instance, the type of information withheld (e.g., commercialization strategy, labor hour estimates, specific results of market research), if released, would provide competitors of the two companies with information that could be used to gain unfair advantage against the companies in future procurements.

However, if an agency withholds material under Exemption 4 on the grounds that its disclosure is likely to cause substantial competitive harm to a person, it must state the reason for believing such harm will result. *Larson Associated, Inc.*, 25 DOE ¶ 80,204 (1996); *Milton L. Loeb*, 23 DOE ¶ 80,124 (1993). Conclusory and generalized allegations of substantial competitive harm are

unacceptable and cannot support an agency's decision to withhold requested documents. *Southern California Edison*, 28 DOE ¶ 80,177 (2001).

In its determination, NETL stated:

The following information has been deleted from the documents and withheld from release pursuant to 5 USC § 552(b)(4) of the Act which protects "trade secrets and commercial or financial information obtained from a person which is privileged or confidential," the disclosure of which would be likely to cause substantial competitive harm to the companies involved. A discretionary release of this type of information cannot be made.

Determination Letter at 1. NETL then listed a description of each type of information (e.g. description of commercialization strategy; labor hour estimates; specific results of market research; proprietary product performance information) and instructions on how to appeal the determination. Determination Letter at 2. In this case, NETL's conclusory Exemption 4 determination does not meet the requirements set forth above.² Accordingly, we shall remand this portion of the Appeal to NETL for a more thorough justification of its withholdings. On remand, NETL must either release the information it withheld or issue a new determination letter providing a detailed justification for withholding in accordance with the instructions set forth above.³

B. Submitter's Failure to Designate Restricted Information

Gideon has also asked us to decide whether DOE's redactions were proper, given that TIAX and ECR did not mark all proprietary information upon first submission to NETL as clearly instructed in the solicitation. *See Xerxe Group Inc.v. United States*, 278 F.3d 1357 (Fed. Cir. 2002) (*Xerxe*) (holding that failure to properly label proprietary information in an unsolicited proposal denied the submitter protection against disclosure). The DOE solicitation directed applicants to place a certain paragraph on the cover page of the application to identify all pages containing proprietary information. The solicitation also directed the applicants to place a legend on each page that contained proprietary information. TIAX and ECR put the legends on their cover sheets and listed those pages with proprietary information. TIAX also marked the specific pages as proprietary, but ECR made no further designations.

We agree with NETL that *Xerxe* is not a FOIA case and thus is not relevant to the issue presented. *See* NETL Comments at 2-3. Further, DOE FOIA regulations and an executive order permit the agency to consider the submitter's views at any time in the FOIA process. The DOE regulation states:

² Gideon noted that some of the information withheld from the TIAX response had been released to the public in a TIAX press release. NETL agrees that information should not be withheld. NETL Comments at 4.

³ The NETL Comments provide an acceptable level of detail on this issue. We also note that NETL has properly released reasonably segregable portions of the documents to Gideon, pursuant to 5 U.S.C. § 552(b).

Whenever a document submitted to the DOE contains information which may be exempt from public disclosure, it will be handled in accordance with the procedures in this section. While the DOE is responsible for making the final determination with regard to the disclosure or nondisclosure of information contained in requested documents, the DOE will consider the submitter's views (as that term is defined in this section) in making its own determination. Nothing in this section will preclude the submission of a submitter's views at the time of the submission of the document to which the views relate, *or at any other time*.

10 C.F.R. § 1004.11 (a) (emphasis added). The executive order formally established a procedural structure for notifying those who submit business information to the government when that information becomes the subject of a FOIA request. Exec. Order No. 12,600, 52 Fed. Reg. 23781 (1987). The order was designed to give business submitters notification and an opportunity to object to disclosure before an agency makes a determination on withholding proprietary information. The Order provides the submitter an opportunity to designate confidential information even if the submitter *did not do so at the time of submission*, as long as "the agency has substantial reason to believe that disclosure of the information would result in competitive harm" Exec. Order No. 12,600, Section 8(e) (1987).

In view of the competitive environment in which TIAX and ECR operate, we agree with NETL's argument that public release of any proprietary information could cause substantial harm to their competitive position. *See* NETL Comments at 4-5. Some information within the applications has great commercial value to the companies. Therefore, we conclude that NETL properly provided TIAX and ECR a second chance to designate proprietary information in their applications prior to making a determination on withholding proprietary information under Exemption 4 of the FOIA.

It Is Therefore Ordered That:

- (1) The Appeal filed by Gideon Group, Inc. on December 14, 2004, OHA Case No. TFA-0081, is hereby granted as specified in Paragraph (2) below and denied in all other aspects.
- (2) This matter is hereby remanded to the National Energy Technology Laboratory which shall issue a new determination in accordance with the instructions set forth above.
- (3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought

in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: March 30, 2005